

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF HAWAII
3

4 WAYNE BERRY,)
5 Plaintiff,) CIVIL NO. 01-00446SPK-LEK
6 vs.)
7 FLEMING COMPANIES, INC.,)
8 aka FLEMING FOODS, INC.,)
9 aka FLEMING, DOE)
10 INDIVIDUALS 1-50 and)
11 DOE PARTNERSHIPS,)
12 CORPORATIONS and OTHER)
13 ENTITIES 1-20,)
14 Defendants.)
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16 TRANSCRIPT OF PROCEEDINGS
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19 The above-entitled matter came on for Further
20 Jury Trial commencing at 9:05 a.m. on Monday, March 3,
21 2003, Honolulu, Hawaii,
22

23 BEFORE: HONORABLE SAMUEL P. KING
24 United States District Judge
25 District of Hawaii

26 REPORTED BY: LISA J. GROULX, COURT REPORTER
27 Notary Public, State of Hawaii

1 THE WITNESS: Thank you.

2 (Witness excused at 9:15 a.m.)

3 THE COURT: Now you can state whether
4 you will rest again.

5 MR. HOGAN: Yes, Your Honor, the
6 plaintiff rests.

7 THE COURT: The plaintiff rests.

8 MR. SMITH: Your Honor, the defense
9 has --

10 THE COURT: Just a minute. That's one
11 of those legal words. It doesn't mean he's going to
12 rest. Means he's going to be very active. What it
13 means is he's not going to all anymore witnesses right
14 now. Passes the ball to the other side to let them
15 know if they're going to -- and we're going to take a
16 10 minute recess.

17 (Jury excused.)

18 THE COURT: We'll stay in session.

19 We'll note the absence of the jury.

20 You started to say something.

21 MR. SMITH: Your Honor, we have prepared
22 some motions for judgment as a matter of law that we
23 would like to file at this time.

24 THE COURT: File them. Have you given
25 them to Mr. Hogan?

1 MR. SMITH: They're going to be served
2 right now.

3 THE COURT: You sure have. Look at that
4 stack. What would you say that was, 4 inches, 5
5 inches?

6 MR. SMITH: Right in that range, Judge.

7 THE COURT: Could you kind of go through
8 them and tell us what you filed?

9 MR. SMITH: Yes, Your Honor.

10 THE COURT: First of all, what did you
11 file without going into the details of each one?

12 MR. SMITH: We moved for judgment as a
13 matter of law on the basis of Section 117 of the
14 Copyright Act, which under the case law that we have
15 submitted authorizes the owner of a copy of software
16 to make changes to it even if they don't own the
17 copyright.

18 We moved for judgment as a matter of law on
19 the issue of actual damages because there is no
20 evidence in the record from which a juror could find
21 the amount that a willing buyer would pay to a willing
22 seller for the changes that were made. The only
23 evidence is Mr. Berry's announcement of what he wants
24 to charge but there's no evidence that that's what a
25 willing buyer would pay.

1 We moved for judgment as a matter of law on
2 the EULA, the end user license agreement, on the
3 ground that there is no mutual assent that state
4 contract law governs the contract formation issues as
5 well as interpretation of non exclusive copyright
6 licenses. Mutual assent is an essential element.
7 There is no evidence from which a juror could find
8 mutual assent in this case.

9 And finally, Your Honor, we moved for
10 judgment as a matter of law on Freight Control System
11 on the ground that the plaintiff failed to meet the
12 statutory formality of submitting a deposit to the
13 copyright office that is virtually identical to the
14 work as it existed at the time it was allegedly
15 created in 1993.

16 The record in this case establishes that the
17 deposit was not what was created in 1993 but rather
18 what it was created in 1999.

19 THE COURT: Is that five of them?

20 MR. SMITH: It's either four or --

21 (Counsel conferring.)

22 MR. SMITH: We move for judgment as a
23 matter of law on the issue of rescission that there is
24 no evidence in the record from which a juror could
25 find a breach that warrants rescission because the

1 theory of rescission is that Fleming claims ownership
2 of this software.

3 The only place that we ever made a claim like
4 is in this legal proceeding after we got sued. The
5 right to plead defenses in the alternative is assured
6 by the Constitution as well as by the Rules of Civil
7 Procedures and there just isn't a material breach that
8 would justify rescission.

9 THE COURT: I will take all of the
10 motions under advisement.

11 MR. SMITH: Thank you, Your Honor.

12 THE COURT: And you may file responses
13 at your leisure.

14 MR. HOGAN: Thank you, Your Honor.

15 THE COURT: In writing, if you want to.

16 MR. HOGAN: Thank you, Your Honor.

17 THE COURT: Do you want to put anything
18 on the record now?

19 MR. HOGAN: If we're going to proceed, I
20 won't waste the court's time.

21 THE COURT: You oppose all of the
22 motions?

23 MR. HOGAN: I oppose everything, Your
24 Honor.

25 THE COURT: You can file something if

1 you want to but I take them under advisement.

2 MR. HOGAN: Thank you, Your Honor.

3 THE COURT: You can renew them at the
4 end of the case.

5 MR. SMITH: Thank you, Your Honor.

6 THE COURT: But I might still take them
7 under advisement. But at that time we can have more
8 argument.

9 MR. HOGAN: Yes, Your Honor.

10 THE COURT: And so we will finish the
11 recess.

12 MR. SMITH: Thank you.

13 (Recess taken at 9:22 -9:32 a.m.)

14 THE COURT: It took a little longer to
15 eat a cookie.

16 MR. SMITH: I hope it was good.

17 THE COURT: For your information, Juror
18 No. 2 gave us some cookies. You can have some too.
19 They're in my office.

20 MR. SMITH: We call Carol Lerche.

21 THE COURT: Oh, we have a new witness.
22 The plaintiffs (sic) is now going to begin.

23 Swear the witness.

24 CAROL LERCHE

25 was called as a witness, by and through the defendant,

1
2 CERTIFICATE
3

3 STATE OF HAWAII)
4 COUNTY OF HONOLULU) SS.
5

6 I, Lisa J. Groulx, Court Reporter, District
7 of Hawaii, Honolulu, Hawaii, and Notary Public, State
8 of Hawaii, do hereby certify that the foregoing is a
9 true and correct transcript of the proceedings in this
10 Jury Trial, WAYNE BERRY vs. FLEMING COMPANIES, INC.,
11 ET AL., at Honolulu, Hawaii, taken on Monday, March 3,
12 2003, before the Honorable SAMUEL P. KING, United
13 States District Judge.

14
15
16 March 3, 2003



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18 LISA J. GROULX, COURT REPORTER

19 Notary Public - State of Hawaii

20 My Commission Expires on: 5/15/06